UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UWAMIE TOMIYASU and KIYO TOMIYASU, Appellants, vs. RICHARD GOLDEN and AUDREY Y. GOLDEN, Appellees.	Civil Appeal No. 20175

APPELLANTS' REPLY BRIEF

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APPELLANTS' REPLY BRIEF

Appellees' Answering Brief does not meet or answer any of the propositions raised under Points One through Four of Appellants' Opening Brief. The answering brief is directed to a question posed by appellees on page 6 of the brief inquiring whether "the final judgment of a court of concurrent jurisdiction preclude(s) appellants from relitigating the same issues and what is substantially the same cause of action?" The argument under this point is not addressed to any legal propositions as such, but is a rambling commentary in which appellees content themselves with relying on the opinion in the first State case (Golden v. Tomiyasu, 1963, 79 Nev. 503, 387 P.2d 989) and the policy of repose which underlies the doctrine of res judicata.

The answering brief ignores the constitutional issue raised under the Due Process Clause as set forth under Point One of appellants' opening brief.

validity of a defense of res judicata must be determined under federal law and that under the principles of federal law, the disposal of important constitutional issues by way of summary judgment is not approved, as set forth under Point Two of appellants' opening brief.

The answering brief ignores the point raised that the present cause of action, grounded on the United States Constitution and cognizable in the Federal Courts, is not the same cause of action as was sued on in the first State case. (See appellants' Point Three in the opening brief)

The answering brief ignores the point made by appellants in Point Four of the opening brief that the lower court has no authority in a proceeding for summary judgment to make findings of fact.

The tack of the appellees is to cling steadfastly to the "finding of fact" made by the Supreme Court of Nevada in the first State case, to the effect that the notice of the trustee's sale was given in strict compliance with the terms of the deed of trust and the statute. Appellees' refusal to go below the surface of this "finding of fact" is understandable--there is no evidence in the case to sustain it. Indeed, the record and the affidavits in this case affirmatively show that no notice was given to the appellants of the sale of their property and that the posted notice was insufficient under the law. Appellees refuse to see, with Mr. Justice Rutledge, that it is not every case "in which the policy of stopping litigation outweighs that of showing the truth." (Angel v. Bullington, 330 U.S. 183, 91 L.Ed. 832,

57 S.Ct. 657, 668, quoted in Howard v. Ladner, Miss., 1953, 116 F.Supp. 783, discussed at pages 33-35 of the Opening Brief.)

The answering brief urges on this Court that the constitutionality of Nevada's statutory provisions regarding notice of foreclosure sales under deeds of trust cannot be considered by this Court because the matter was not raised in the lower Court. Although the pleadings do not make a specific attack on these statutes, the allegations of the complaint are broad enough to challenge the constitutionality of the whole process culminating in the appellants being stripped of their property, including the Nevada statutes. But if appellants are in error in this contention, then it must be remembered that this case has never been tried. A judgment has been entered in proceeings under Rule 56 for summary judgment. If that judgment is reversed by this Court, the case will be tried in the lower court, where in advance of trial the pleadings can readily be amended to include the issue of the constitutionality of the Nevada statutes with all the specificity that appellees desire.

It is charged by appellees at page 9 of the answering brief that the argument of appellants that they were not parties litigant and did not participate in the first State case in person or by an attorney is "specious." That word is defined in The New Century Dictionary, Appleton Century Ed., as "fair-seeming, superficially pleasing, or apparently good or right, without real merit."

A charge that an argument, or an affidavit where the facts on which that argument is based are contained, is "specious," is an attack upon the credibility of the sworn statements. The credibility of sworn statements contained in affidavits filed in opposition to motions for summary judgment is not a matter which the court may determine in the proceedings authorized under Rule 56. U. S. v. General Ry. Signal Co. (W.D., N.Y., 1952) 110 F.Supp. 422; Colby v. Klune, 2d Cir., 1949, 178 F.2d 872; 6 Moore's Federal Practice 207

The attorney for appellants has filed an affidavit in this cause stating that he was the attorney for the present appellants in the first State case. As to this seeming contradiction in the affidavits, appellees have suggested that appellants should bring complaint for their grievances against appellants' attorney.

The attorney for appellants stands ready at any time to account for the discharge of his professional obligations in any court in this country where the matter is raised. But that matter is not raised on this appeal and appellees' suggestion of it should not be used to cloud the matters which are raised by this appeal, one of which is a question critical to the law of res judicata: were the appellants merely formal or ostensible parties to the first State case, or were they actual parties litigant. The appellants and their attorney are now before this Court asking for a day in court in which the trial judge will make a lawful determination of this and the other genuine issues of material fact which exist in this case.

The principle is summed up in the following statement from 6 Moore's Federal Practice, pp. 2257, 2258:

> "Under general basic principles that control the grant or denial of summary judgment, a motion for summary judgment on the basis of a prior judgment should be denied if the prior judgment has no res judicata or collateral estoppel effect between the parties to the present action; or of there is a genuine issue of material fact as to the validity of the prior judgment, its scope and coverage, privity, or whether it was on the merits so that it is controlling in the case at bar."

Appellants renew each and every point set forth in their opening brief and respectfully urge that the summary judgment appealed from be now reversed.

Respectfully submitted:

Harry E. Claiborne

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Attorney for Appellants

RECEIPT OF THREE COPIES OF
the foregoing is acknowledged
this 4th day of November, 1965.
BABCOCK & SUTTON
By Howard W. Babcock BA
Attorneys for Appellees